

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-05-21

Case Number: A50/2007

UNREPORTABLE

In the matter between:

JULY NKOSINATHI MAJOLA

Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an appeal against sentence. On 5 December 2005 the appellant was convicted in the Pretoria High Court (per Ranchod AJ) of murder, housebreaking with intent to rob and robbery with aggravating circumstances, contravening section 2 of the Arms and Ammunition Act, 75 of 1969 (unlawful possession of a firearm) and contravening section 36 of Act 75 of 1969 (unlawful possession of ammunition). The appellant's co-accused, Thabo Jabu Montsha, was convicted of housebreaking with intent to rob and robbery with aggravating

circumstances. On 7 March 2006 the court *a quo* sentenced the appellant to life imprisonment for the murder, 15 years imprisonment for the housebreaking with intent to rob and robbery with aggravating circumstances and three years imprisonment for contravening sections 2 and 36 of Act 75 of 1969, the two counts being taken together for the purpose of sentence. The court *a quo* ordered that the sentences on all the other counts run concurrently with the sentence of life imprisonment for murder. The court *a quo* sentenced the appellant's co-accused to 7 years imprisonment of which 4 years were conditionally suspended for 5 years.

[2] The appellant unsuccessfully applied to the court *a quo* for leave to appeal against the convictions but was granted leave to appeal to this court against the sentences. The appellant's petition to the Supreme Court of Appeal for leave to appeal against the convictions was also unsuccessful.

[3] On appeal the appellant's counsel contends that this court must set aside the sentences because of serious misdirections by the court *a quo* and accordingly that this court is at liberty to reconsider sentence and impose fresh sentences. Appellant's counsel relies on the following misdirections by the court *a quo*:

(1) It wrongly took into account the fact that the appellant had a previous conviction for unlawful possession of ammunition when

it was common cause that the appellant did not have such a previous conviction;

- (2) It wrongly took into account the fact that the appellant had a previous conviction for unlawful possession of ammunition in deciding that there were no substantial and compelling circumstances which would justify the imposition of a lesser sentence;
- (3) It failed to consider the appellant's relative youthfulness in conjunction with the other mitigating factors in deciding whether there are substantial and compelling circumstances which would justify the imposition of a lesser sentence;
- (4) It wrongly found that the fact that a person had lost his life in the incident was an aggravating factor;
- (5) It wrongly found that –
 - (i) the appellant was the mastermind who played a leading role in the commission of the offences;
 - (ii) the appellant was personally responsible for the killing of the deceased;

- (iii) the appellant was in possession of the firearm used to murder the deceased;

When these findings are not supported by the facts.

- [4] In its judgment the court *a quo* accepted the evidence of the state witnesses (i.e. that the appellant went to the premises in question, broke the lock on the door by firing a shot at it, entered the premises with his co-perpetrators, told his co-perpetrators what to steal, shot and killed the deceased, who was looking after the premises, and then left, taking the stolen property) and rejected the appellant's alibi (i.e. that he was at home with his father at the time of the incident). The court *a quo* also rejected the evidence of the appellant's father who, the court found, would do anything to protect the appellant. There was an overwhelming case against the appellant. The two main witnesses and his co-accused placed him on the scene committing the crimes. He was clearly the leader of the group, the only one armed with a firearm and the instigator of the crimes. The deceased was found dead in a freezer. He had been shot four times in the head and neck.
- [5] In ***S v Pillay* 1977 (4) SA 531 (A)** at 535D-G the court said the following with regard to the effect of a misdirection –

‘Now the word “misdirection” in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As

the essential enquiry in an appeal against sentence however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence: it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh".

- [6] Although the court *a quo* did not find that the murder of the deceased was planned or premeditated it is clear from the judgment that the appellant murdered the deceased either in committing or after having committed the offence of robbery with aggravating circumstances. Accordingly, section 52(1) read with Part I of Schedule 2 of Act 105 of 1997 applied and the court *a quo* was obliged to sentence the appellant to life imprisonment unless it found, in terms of section 51(3)(a) of the Act, that substantial and compelling circumstances existed which justified the imposition of a lesser sentence. Similarly, in terms of section 51(2)(a) read with Part II of Schedule 2 of Act 105 of 1997, the court was obliged to sentence the appellant to 15 years imprisonment for the robbery with aggravating circumstances unless it found substantial and compelling circumstances. The two offences are very serious and that the Legislature clearly intends that they be severely punished.

[7] The court *a quo* was aware of the seriousness of the offences and the heavy prescribed sentences which must be imposed and that a lesser sentence could be imposed if the court found that there were substantial and compelling circumstances which would justify a lesser sentence. The court considered the appellant's personal circumstances and the fact that from the Probation Report the appellant appears to come from a model home and up to the date of the crimes seemed to be a model citizen. Nevertheless the court *a quo* could not find the existence of substantial and compelling circumstances. Not even the appellant's relative youthfulness when the crimes were committed persuaded the court that such circumstances existed. In finding that this was so the court *a quo* took into account the fact that the appellant had two previous convictions: one for housebreaking and one for unlawful possession of ammunition. In referring to the second previous conviction the court *a quo* erred as it was common cause that the appellant did not have such a previous conviction.

[8] This error is duplicated in the appellant's argument and will be dealt with as one ground. The court *a quo* clearly was confused by the discussion of the previous convictions before sentence was passed. In my view this clear misdirection does not vitiate the court *a quo*'s decision on sentence. The nature of the misdirection, the degree and the seriousness of the misdirection, do not show that the court did not

exercise its discretion at all or exercised it improperly or unreasonably. It is clear from its reasons that the court gave due consideration to the seriousness of the crimes, the sentences prescribed, the possibility of lesser sentences in the event of a finding of substantial and compelling circumstances and the interests of the community. The court's reasons are balanced and fair. The fact that the appellant was (about) 20 years old at the time of the crimes was considered and quite correctly the court considered that the previous conviction for housebreaking could not be ignored. The court obviously had in its mind the role of the appellant in committing the offences and the callousness of the murder. There is no suggestion that the deceased resisted or made any attempt to stop the robbers from stealing his employer's property. On the evidence there are two possible reasons for the murder. Either the appellant killed the deceased so that the deceased would not be able to identify him or the appellant killed him simply because he could. Neither reason reflects favourably on the appellant. The appellant then stuffed the body into the freezer. None of this indicates that the appellant's youthful lack of judgment moved him to commit the crimes.

- [9] The appellant's complaint that the court *a quo* misdirected itself by finding that a person lost his life in the incident is misconceived. The court *a quo* found it an aggravating factor that the appellant took the life of a man who was entrusted by his employer to look after the tuck shop by sleeping inside it in an adjacent room.

[10] There is also no merit in the so-called evidentiary misdirections. These are not misdirections at all. They are the factual findings which the court *a quo* made when convicting the appellant. The court *a quo* found that the appellant played a leading role in the commission of the offences, that he was the only one armed and that the deceased died at his hand. The appellant's counsel argued strenuously that the appellant is entitled to attack these factual findings to show that they are not correct. While conceding that the appellant is guilty he argued that the true facts will show that the appellant was less blameworthy than the court *a quo* found. The appellant's counsel was unable to refer to any authority in support of this approach and conceded that it is novel. In my view it is misconceived. An appeal against sentence is governed by section 322(2) of Act 51 of 1977 which provides that the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial. These words are explicit and preclude the court of appeal from enlarging the ambit of an appeal against sentence so as to include an appeal against the conviction – see ***S v Matshoba and Another* 1977 (2) SA 671 (A)** at 677G-H; ***S v Langa en Andere* 1981 (3) SA 186 (A)** at 189F-H. It follows that when an appellant has been refused leave to appeal against his conviction his appeal against sentence must be considered in the light of the facts found by the court convicting him. If the appellant is allowed to challenge the correctness of the factual findings of the trial court the state will then seek to justify these findings and a rehearing of the merits will take place. That is

what the refusal of leave to appeal against conviction does not permit. The judgment in ***S v Vilakazi 2009 (1) SACR 552 (SCA)*** relied on by the appellant's counsel does not purport to overturn the judgments in ***S v Matshoba and Another supra*** and ***S v Langa en Andere supra*** or lay down a new principle that the court of appeal may go into the merits of the conviction in order to decide the appeal against sentence.

[11] The alibi defence adopted by the appellant and the fact that the appellant did not testify in mitigation of sentence means that the appellant could not challenge the correctness of the factual findings made by the court to advance an account in which he played a lesser role. As already mentioned, there is no appeal against the convictions and the versions which the court accepted are the versions which this court must accept.

[12] It is striking that the appellant has demonstrated no remorse whatsoever. Throughout the probation officer's report it is stated repeatedly that he denies that he committed the crimes.

[13] In my view, the sentences which were imposed are proper sentences and are appropriate in the circumstances of the case. I would have imposed those sentences if I had been required to approach the question of sentence afresh.

Order

[14] The appeal against sentence is dismissed.

B.R SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

E.M. MAKGOBA
JUDGE OF THE HIGH COURT

I agree

S. SAPIRE
ACTING JUDGE OF THE HIGH COURT

CASE NO: A50/2007

HEARD ON: 15 April 2009

FOR THE APPELLANT: ADV. L. KOK

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. B.E. MAOKE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 21 May 2009